IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1135 OF 2005

IN

SUIT NO.704 OF 2000

Anupam Chandragupt Agarwal & others. ... Plaintiffs.

vs.

Mrs.Kantarani Manoharlal Agarwal & others. ...Defendants.

And

Runwal Builders Pvt. Ltd. ...Respondent.

Mr.S.S.shetty i/b. M.M.Vashi, for Plaintiffs.

Mr.S.Shetye i/b. B.Amin & Co. for Defendant nos.1 to 6.

Ms.Hetal Patel i/b. Desai & Diwanji, for defendant no.8 in support.

Mr.Virag Tulzapurkar with N.Toor i/b. Mahimtura & Co. for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 12th October,2006

P.C.:-

1. This is a notice of motion taken out by defendant no.8. By

prayer clause (a) of this notice of motion the defendant no.8 prays for recalling of the order passed by this Court in chamber summons no.289 of 2002. By order dated 13.3.2002 the Court has granted that chamber summons no.289 of 2002 in terms of prayer clause (a) and (b). By prayer clause (a) of that chamber summons the plaintiff moved for amendment in the plaint by deleting certain properties from Exhibit A. Perusal of the order dt.13.3.2003 passed by the Court shows that the order was passed on the basis of the consent terms filed by the parties. Perusal of the minutes of order at Exhibit M to the affidavit filed in support of this notice of motion shows that the consent was given by defendant nos. 1 to 7 and the name of defendant no.8 was allowed to be deleted from the chamber summons. The suit of the plaintiff is for partition of the joint family property. Defendant no.8 even, according to the averment in the plaint, is a sharer. Obviously, therefore, no amendment in the plaint could have been ordered without the consent of defendant no.8 or without hearing the defendant no.8.

2. Admitted position is that the amendment in the plaint has been granted by the order passed in the chamber summons no.289 of 2002 without granting any opportunity of being heard to defendant no.8. The learned Counsel appearing for plaintiff relied on the averments made in paragraph 4 of the affidavit filed in support of notice of motion. Perusal of those averments shows that according to

defendant no.8 she was aware of the institution of the suit. In my opinion, even assuming that defendant no.8 was aware of institution of the suit and even accepting the averments of the plaintiff that she was avoiding service then also the plaintiff was not justified in asking order for amendment by deleting defendant no.8 from the chamber summons. When according to the plaintiff, the defendant no.8 was already served with the chamber summons, then it was for him to take appropriate order from the Court and then in the absence of defendant no.8 the chamber summons will be required to be decided by the Court on merits. Allowing the chamber summons for amendment in the plaint in the absence of defendant no.8 cannot be justified. and therefore, in my opinion, the order passed in the chamber summons will have to be recalled. It is made clear that the defendant no.8 has sought other reliefs by this notice of motion but I am not considering those reliefs at this stage. The defendant no.8 shall be at liberty to apply for those reliefs at appropriate stage. The notice of motion is therefore, granted in terms of prayer clause (a). Now chamber summons no.289 of 2002 is restored. The defendant no.8 to file reply in the chamber summons, within a period of two weeks. Office to place the chamber summons before the appropriate Court for hearing thereafter.